Discrimination Law Association

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Response to the Policy review paper:
The Public Sector Equality Duty: reducing bureaucracy

1. The Discrimination Law Association ('DLA'), a registered charity, is a membership organisation established to promote good community relations by the advancement of education in the field of anti-discrimination law and practice. It achieves this by, among other things, the promotion and dissemination of advice and information, the development and co-ordination of contacts with discrimination law practitioners and similar people and organisations in the UK and internationally. The DLA is concerned with achieving an understanding of the needs of victims of discrimination amongst lawyers, law-makers and others and of the necessity for a complainant-centred approach to anti-discrimination law and practice. With this in mind the DLA seeks to secure improvements in discrimination law and practice in the United Kingdom, Europe and at an international level.

2. The DLA is a national association with a wide and diverse membership. The membership is growing and currently consists of over 300 members. Membership is open to any lawyer, legal or advice worker or other person substantially engaged or interested in discrimination law and any organisation, firm, company or other body engaged or interested in discrimination law. The membership comprises, in the main, persons concerned with discrimination law from a complainant perspective. The DLA is a company limited by guarantee.

3. In preparing this response, the DLA has had the benefit of seeing early draft responses by the Institute of Employment and Diversity Practitioners, Winning the Race Coalition and the Equality and Diversity Forum.

<u>General comments on the proposed new approach</u>

4. The DLA shares the views of many organisations regarding the unsatisfactory process which the government and the GEO have adopted in relation to regulations to impose specific equality duties under s. 153 of the Equality Act 2010. To propose different, significantly diluted, specific duties in March 2011 after publishing draft regulations in January 2011 conveys a message which contradicts the commitment to equality in the government's Equality Strategy[1].

[1] The Equality Strategy: Building a Fairer Britain, December 2011

The process itself suggests that effective compliance with the important aims in s.149 of the Equality Act is of lesser importance than the reduction of bureaucracy and stripping out of "unnecessary process requirements". Further, the late decision to revise the draft specific duties has resulted in delay and confusion, since the new public sector equality duty came into force on 5 April 2011 replacing the previous race, disability and gender equality duties; but no specific duties came into force to replace those made under the race, disability and gender equality duties.

5. As the DLA indicated in our response to the August 2010 consultation "The Public Sector Equality Duty - Promoting equality through transparency" (referred to below as 'the August 2010 consultation') the DLA believes that the public sector equality duty in the Equality Act 2010 has the potential to secure real and lasting improvements in equality of opportunity for people who share protected characteristics covered by the duty. We saw then, and still see, that specific duties can play a vital role in setting out the approach authorities should take towards compliance with their equality duty and influencing whether the duty achieves its potential.

6. The DLA is clear that the basic legal duty on every listed public authority is to comply with s.149(1). We do not regard any specific duties which the Secretary of State may impose pursuant to s.153 as any form of proxy for the duty in s.149(1) ('the general equality duty'), and we are satisfied that this was never the intention of parliament. However in many areas of public law it is well established that a supportive framework contained in secondary legislation can contribute to proper compliance with a duty in primary legislation.

7. In the light of the current proposals for specific duties we feel it is necessary to repeat one of the recommendations in the 2009 research report by Schneider-Ross, who had been commissioned by the Government Equalities Office ('GEO') to look at the costs and effectiveness of the race, disability and gender equality duties. After recording the experiences of a large number of public authorities, Schneider-Ross recommended "Don't change the core requirements too much as this could undermine the learning that has gone on to date." Regretfully, in our view, the current proposals do even more than the proposals on which we commented last year to shelve the requirements of the specific duties attached to the previous equality duties, including those that would enhance an approach based on transparency and public accountability. We perceive a concern by at least some public authorities that the message of the March 2011 Policy review paper is very much as Schneider-Ross had warned, namely that measures to comply with previous equality duties not only are no longer necessary but are ill advised and out-dated. This could significantly weaken the commitment and capacity of public authorities to comply with the general equality duty.

8. In our response to the August 2010 consultation we acknowledged that transparency is an essential element in demonstrating compliance by a public authority with the general equality duty imposed by parliament. With reference to the specific duties then under consideration, we stated that we did not share the government's view that transparency requirements on their own would achieve the purpose parliament intended when it empowered the Secretary of State to impose specific duties.

9. The government's Equality Strategy focuses on two principles of equality: equal treatment and equal opportunity (page 6). It states, "We will put equality at the heart of government, ensuring that we lead by example, embed equalities across all departments and work in partnership with business, community groups and wider society to deliver tangible results" (page 23). This undertaking that the public sector will take on an active leadership role in relation to equality has a slightly hollow ring when, in the March 2011 Policy review paper, the government appears to give greater weight to reducing "burdens" than to enabling effective promotion of, and leadership on, equality.

10. The Act gives a Minister of the Crown power by regulations to impose duties on a public authority specified in Part I of Schedule 19 for the purpose of enabling the better performance by the authority of the duty imposed by section 149(1). To make regulations under s.153 is permissive, not mandatory. If the government chooses to make regulations under s.153 to impose specific duties on major public authorities, then those specific duties must be demonstrably capable of enabling better performance of the general equality duty by those authorities; if this is not the case then, arguably, such regulations would be *ultra vires.*

11. The Policy review paper (para. 16) refers to shifting the focus of public bodies onto "the delivery of equality improvements for their staff and service users…." and states that "challenge from the public will be the key means of holding public bodies to account for their performance on equality". It is therefore important to take note of the public authorities to which this new approach will apply. The list includes nearly all government departments and all government Ministers, all national public authorities, for example the National Audit Office, the Information Commissioner, the inspectorates for police, prisons, CPS and probation (England and Wales), the Care Quality Commission and ACAS, as well as local government, education, police and health bodies in England. The GEO has not, in its Policy review, offered any evidence that the two minimal publishing requirements in the new draft regulations will provide the means for members of the public to hold government Ministers, central government departments or major national public authorities to account for their compliance with the general equality duty.

12. The DLA is concerned that the new approach described in the Policy review paper, which is entitled "The public sector Equality duty: **reducing bureaucracy**" (our emphasis), represents de-regulation for the sake of de-regulation, rather than a considered view as to what form of regulation, if any, would meet the requirement in s. 153. This 'light touch' approach creates a real risk that some public authorities may be misled to thinking that their duty under s.149(1) of the Equality Act is also 'light touch', which, we are satisfied, was not the intention of parliament.

13. If public authorities are not required to publish details of engagement when determining policies or equality objectives nor required to publish assessments of equality impact or equality analyses and the information they consider when undertaking such assessments or analyses, they may well face a barrage of requests under the Freedom of Information Act from members of the public wanting to see the evidence on which authorities relied in making a decision or maintaining or revising a policy or practice. In terms of bureaucratic burden and cost, the latter is likely to outweigh by far the steps public authorities would need to take to publish the information no longer required as stated in the Public policy review (para. 14).

<u>Light-touch transparency requirement</u>

14. The new draft regulation 3 requires each listed public authority to publish "information to demonstrate its compliance with the duty imposed by section 149(1) of the Act." Regulation 3(2) requires an authority's published information to include information relating to people who share a relevant protected characteristic who are its employees (if it employs 150 or more employees) and other persons affected by its policies and practices. Critically, what has been removed from the previous draft regulations is that a public authority must publish **"**<u>sufficient</u> information" to demonstrate compliance with the s.149(1) duty; this takes away, without explanation, a standard against which members of the public could measure an authority's performance.

15. The Policy review paper (para. 19) acknowledges that to comply with the general equality duty, that is to have due regard to the aims set out in s.149(1), public bodies "will need to understand the effect of their policies and practices on equality – this will involve looking at evidence, engaging with people, staff, service users and others and considering the effect of what they do on the whole community." The conclusion, apparently based solely on the commitment to "reduce bureaucracy" and not demonstrated by evidence regarding effective compliance, is that these essential steps will not be included as specific duties but will be "delivered through guidance not regulation". If the government is satisfied that to have *due regard* such steps are necessary then there is no gain

to public authorities by specifying them in guidance, the steps will still need to be carried out; the difference is that to rely on guidance reduces legal clarity and can be taken as an indicator by many authorities that they are no longer required to consider the effect on equality of their policies and practices.

16. The DLA is concerned that under the new draft regulations a public authority which failed in the past to comprehend what was required to comply with the race, disability or gender duties will be able to hide behind this corporate lack of understanding. The new draft regulations will signal to those authorities which did very little to make race, disability and gender equality integral to the ways in which they carry out all of their functions that they may carry on as before. To those public authorities which have invested in making equality a core element in their policies, practices and decision-making the new draft regulations are likely to indicate that such commitment is no longer required.

17. The courts have helped public authorities to understand what they are expected to do to have *due regard* to the elements of the previous equality duties. We attach as an annex to this submission an extract from the judgment in *Brown, R (on the application of) v Secretary of State for Work and Pensions*[2] in which Aikens LJ sets out how, in practice, a public authority fulfils its duty to have "due regard" to the identified goals set out in s.49A(1) of the Disability Discrimination Act 1995, which we submit is equally applicable to the new duty under s.149(1) of the Equality Act 2010. It is, of course, not only when a decision is challenged, but when carrying out any of its relevant functions that a public authority needs to be able to demonstrate that it has had due regard to the aims set out in s.149(1). The DLA finds it difficult to reconcile the elements we have highlighted in the clear guidance on compliance in *Brown* with the minimal publishing requirement in the new draft regulations.

18. Important lessons have been learned not only from case law but also from the actual changes to policies and practices by public authorities. Public authorities have been challenged in the courts because groups or individuals are increasingly aware that decisions by a public authority must take equality matters into account. Where such challenges have been unsuccessful this has rarely been because the challenge was invalid but because the public authority had been able to demonstrate that it had, to the court's satisfaction, paid due regard to the elements of the equality duty. The possibility of legal challenge has served as a useful reminder for public authorities of the importance of meeting their equality duties. The government is seemingly now relying on potential challenge by individuals and organisations as the main force to secure compliance. Under the previous equality duties which were supported by specific duties requiring

[2] [2008] EWHC 3158 (Admin) (18 December 2008)

arrangements for assessing equality impact, monitoring, gathering information, involving and consulting, individuals and organisations have been able to use evidence of a public authority's compliance, or otherwise, with relevant specific duties as an indicator of its compliance with the general duty. The previous specific duties provided a framework and a set of standards against which the performance of a public authority could be scrutinised, which will no longer be available.

19. The lack of formal standards or a framework as to what compliance with the general equality duty should look like is perhaps an even greater problem for public authorities. Not only each public authority but also separate sections within a public authority may interpret compliance differently. Or an authority may interpret compliance as meaning one thing for it as an employer and another thing as a provider of services or as a body carrying out regulatory or enforcement powers. An authority could decide that compliance involves different obligations for front-line services compared to long-term strategic planning. Without structures imposed by regulation, there is a risk that many public authorities will be forced to take on new bureaucratic burdens in order to develop their own frameworks and internal reporting structures. The Equality Act is clear that the duty to have *due regard* to the aims set out in s.149(1) applies to all public authorities listed in Schedule 19. The concept of *due regard* incorporates proportionality; thus there is absolutely no need to remove obligations to make the specific duties more proportionate.

20. In the DLA response to the August 2010 consultation we commented in some detail on the proposed requirement on authorities with 150 or more employees, in publishing information relating to performance of the general equality duty, to publish information relating to the protected characteristics of its employees. It remains our view that this duty as set out in the new draft regulations will not enable authorities or equality groups or wider civil society effectively to monitor authorities' performance on employment equality. The January 2011 draft regulations included a stronger provision, requiring this to be "information on the effect its policies and practices have" on its employees who share a protected characteristic, and the regrettable decision to revert to the August 2010 version makes this requirement far less helpful to public authorities. To comply with the general equality duty it is not enough simply to gather and publish information on, for example, the number of ethnic minority or disabled employees; this offers no real information about how ethnic minorities or disabled people are treated and/or how they are, or are not, progressing under an authority's employment policies and practices. We are concerned that many public authorities will interpret this aspect of the 'light tough transparency regulation' as a duty merely to measure and publish overall rates of employment and will leave themselves open to legal challenge by failing to have due regard to other aspects of their employment

policies and practices such as job segregation by gender, race or disability, disproportionality in disciplinary or capability procedures or differential access to training.

Equality objectives

21. The DLA does not agree with the government's assessment that to require a public authority to prepare and publish "objectives" as opposed to "one or more objectives" would result in a disproportionate burden on public authorities of different sizes. The Policy review paper suggests that, in taking a proportionate approach, taking account of "the size and role of a public authority and its current equality performance, in some circumstances a singe objective could be appropriate". We would reiterate that proportionality is built into the *due regard* element of the general equality duty and applies to all of an authority's functions, so action to determine and achieve any objectives should also be proportionate.

22. In the view of the DLA, draft regulation 2(1), which requires a public authority to prepare and publish "one or more objectives it thinks it should achieve to do any of the things mentioned in paragraphs (a) to (c) of subsection 1 of section 149 of the Act" fails to describe accurately what the general equality duty requires in terms of objective setting. While this regulation could be read as permitting a public authority of any size to prepare and publish only one objective in a four year period, were a government department, a national public authority or a large local authority to do so they would be likely to leave themselves open to legal challenge for failing to meet the general equality duty. Public authorities could also face legal challenge were they to choose to focus their one (or more) objectives on the easiest and most acceptable and/or least challenging equality issue(s), which this regulation could be read as permitting.

23. The DLA is concerned that this limited requirement could enable a public authority to remain in denial regarding discrimination against, or exclusion of, people who share particular protected characteristics or those who are least visible or audible. It could also enable a public authority to limit its approach to, say, eliminating discrimination, and to do very little to advance equality or foster good relations. We believe that to comply with the general equality duty every public authority should consider preparing and publishing objectives for all of the protected characteristics and wherever possible objectives that relate to each of the aims of the general equality duty. If a public authority determines not to publish an objective in relation to one or more protected characteristics then it should be expected to publish its reasons, as is now required under the specific duties for Welsh public authorities[3].

[3] Reg. 3(3), The Equality Act 2010 (Statutory Duties)(Wales) Regulations 2011

24. One of the obvious defects of the proposed specific duties is that they operate retrospectively, after a public authority has taken or has omitted to take particular steps. The critical stage for equality objectives is not the publication but the process by which a public authority determines what its objective(s) will be. Under the previous draft regulations there was a duty to publish how, in developing its objectives, a public authority had engaged with people it considered to have an interest in furthering the aims of the general equality duty. This engagement requirement was likely to assist a public authority to determine objectives that would make a relevant and meaningful contribution to its full compliance with the general equality duty. The previous specific duties also required a public authority to consider the information about its performance of the general equality duty when developing its objectives. It is regrettable that these requirements, which required a public authority to take relevant matters into account, have been removed in the new draft regulations. Implicit in the duty to have *due regard* is the duty to take relevant matters into account; it therefore seems perverse to remove these requirements in order to relieve public authorities of any unnecessary burden.

25. For any degree of public accountability there should be some indicators to evaluate the suitability of an authority's equality objectives as well as to evaluate the effectiveness of steps an authority takes to make progress towards achieving its objectives.

Next steps

26. The DLA urges the GEO and the government to demonstrate their willingness to learn from the experiences of public authorities, trade unions, voluntary and community organisations and others and to give due weight to their views on the proposed new approach set out in the Policy review paper. It benefits no one to require public authorities to comply with specific duties that do nothing to enable them to meet their s.149(1) duty. Where the GEO receives good evidence that proposed specific duties could make it more likely that authorities will fail to comply with the s.149(1) duty, we would expect the GEO to reconsider its proposals.

27. If specific duties (whether the January 2011 version or the version in the new draft regulations) are to be relevant, effective and of benefit to the major public authorities to which they will apply and to members of the public, it is essential that they are accompanied by a detailed and robust statutory code of practice. The "lighter" the "touch" of the specific duties, the greater the need for a statutory code that clarifies what is needed to demonstrate *due regard.* To achieve real transparency and real public accountability, public authorities and members of the public will need to be able to refer to a code which spells out the steps a

public authority should take to meet the general equality duty. The code also needs to be of value to the courts when they are considering relevant questions of compliance. We therefore urge the GEO to encourage and support the Equality and Human Rights Commission to issue a code of practice on the public sector equality duty that is capable of meeting the needs of all parties.

Discrimination Law Association

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ANNEX

Brown, R (on the application of) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin) (18 December 2008)

Judgment of Aikens LJ for himself and Scott Baker LJ

90. … how, in practice, does the public authority fulfil its duty to have "due regard" to the identified goals that are set out in section 49A (1)? An examination of the cases to which we were referred suggests that the following general principles can be tentatively put forward. **First, those in the public authority who have to take decisions that do or might affect disabled people must be made aware of their duty to have "due regard" to the identified goals**: compare, in a race relations context *R(Watkins – Singh) v Governing Body of Aberdare Girls' High School [2008] EWHC 1865 at paragraph 114 per Silber J*. Thus, an incomplete or erroneous appreciation of the duties will mean that "due regard" has not been given to them: see, in a race relations case, the remarks of Moses LJ in *R (Kaur and Shah) v London Borough of Ealing [2008] EWHC 2062 (Admin) at paragraph* 45.

91. **Secondly, the "due regard" duty must be fulfilled before and at the time that a particular policy that will or might affect disabled people is being considered by the public authority in question. It involves a conscious approach and state of mind**. On this compare, in the context of race relations: *R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213 at para 274 per Arden LJ.* **Attempts to justify a decision as being consistent with the exercise of the duty when it was not, in fact, considered before the decision, are not enough to discharge the duty**: compare, in the race relations context, the remarks of Buxton LJ in *R(C) v Secretary of State for Justice [2008] EWCA Civ 882 at paragraph 49.*

92. **Thirdly, the duty must be exercised in substance, with rigour and with an open mind. The duty has to be integrated within the discharge of the public functions of the authority. It is not a question of "ticking boxes".** Compare, in a race relations case the remarks of Moses LJ in *R (Kaur and Shah) v London Borough of Ealing [2008] EWHC 2062 (Admin) at paragraphs 24 - 25.*

93. However, **the fact that the public authority has not mentioned specifically section 49A (1) in carrying out the particular function where it has to have "due regard" to the needs set out in the section is not determinative of whether the duty under the statute has been performed:** see the judgment of Dyson LJ in *Baker at paragraph 36.* **But it is good practice for the policy or decision maker to make reference to the provision and any code or other non – statutory guidance in all cases where section 49A (1) is in play. "In that way the [policy or] decision maker is more likely to ensure that the relevant factors are taken into account and the scope for argument as to whether the duty has been performed will be reduced":** *Baker at paragraph 38.*

94. **Fourthly, the duty imposed on public authorities that are subject to the section 49A (1) duty is a non – delegable duty**. The duty will always remain on the public authority charged with it. In practice another body may actually carry out practical steps to fulfil a policy stated by a public authority that is charged with the section 49A(1) duty. In those circumstances the duty to have "due regard" to the needs identified will only be fulfilled by the relevant public authority if (1) it appoints a third party that is capable of fulfilling the "due regard" duty and is willing to do so; and (2) the public authority maintains a proper supervision over the third party to ensure it carries out its "due regard" duty. Compare the remarks of Dobbs J in *R (Eisai Limited) v National Instituted for Health and Clinical Excellence [2007] EWHC 1941 (Admin) at paragraphs 92 and 95.*

95. **Fifthly, (and obviously), the duty is a continuing one**.

96. **Sixthly, it is good practice for those exercising public functions in public authorities to keep an adequate record showing that they had actually considered their disability equality duties and pondered relevant questions. Proper record - keeping encourages transparency and will discipline those carrying out the relevant function to undertake their disability equality duties conscientiously. If records are not kept it may make it more difficult, evidentially, for a public authority to persuade a court that it has fulfilled the duty imposed by section 49A(1)**: see the remarks of Stanley Burnton J in *R(Bapio Action Limited) v Secretary of State for the Home Department [2007] EWHC 199 (Admin) at paragraph 69,* those of Dobbs J in *R(Eisai Ltd) v NICE (supra) at 92 and 94,* and those of Moses LJ in *Kaur and Shah (supra) at paragraph 25.*